FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-665

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Petitioners,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Respondents.

and Consolidated Cases.

PETITIONER, FITZGERALD'S, REPLY BRIEF

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HARVEY GOLDSTEIN,
On the Brief

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The collision herein occurred in international waters,[1] outside British territorial limits.

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[1] What British fishing rights are is immaterial, whether there is a 3, 12 or 200 mile limit, since the parties now agree upon the applicability of the international general maritime law as determined by the forum. Additionally, the applicability of the Death on the High Seas Act, 46 U.S.C. 761, et seq., is beyond dispute, *Middleton* v. *Luckenbach*, 70 F.2d 326 (2C), involving death of British West Indies subjects on ship in collision with American ship on the high seas off B.W.I.; *Pet. of Risdal & Anderson*, 291 F.Supp. 353, the Court holding that claimants of alien seamen have the same rights under the statute as they would have if their decedents were United States citizens (357); and this Court's decision in *Moragne* v. *States Marine*, 398 U.S. 375, concerning wrongful death statutes as part of the general law favoring recovery in the absence of a legislative direction to except a particular class of cases (390-393).

There is no contact in this matter with the United States only if the following are ignored:

1. The defendant Texaco is a Delaware corporation;

2. The corporation has its base of operations in New York City, its principal place of business;

3. Defendant TexPan[2] is a wholly owned corporate subsidiary of defendant Texaco;

4. TexPan is the nominal owner and Texaco is the true owner of its "runaway flag", "flag of convenience" vessel, "Texaco Caribbean", *Hellenic Lines* v. *Rhoditis*, 398 U.S. 306; *Barthelomew* v. *Universe Tankships*, 263 F.2d 437 (2C); *Pavlou* v. *Ocean Traders*, 211 F.Supp. 320; *Zielinski* v. *Empressa*, 113 F.Supp. 93;

5. The suit is predicated upon international general maritime law as interpreted by United States judicial decision, *The Belgenland*, 114 U.S. 355; *The Scotland*, 105 U.S. 24; and upon United States statutory law, the Death on the High Seas Act, 46 U.S.C. 761, et seq., *Middleton* v. *Luckenbach*, 70 F.2d 326 (2C); *Algeria* v. *Grand Bassa*, 337 F.Supp. 401; *Pet. of Risdal & Anderson*, 291 F.Supp. 353.

6. The suit is based upon the negligent failure of that highly placed personnel in Texaco's New York office to make their decision and advise their approval to Texaco's London office (TOT) to arrange for the hiring of Smit-Tak to locate and mark the hull, as determined by recent United States cases, *Ingram* v. *Ohio River*, 505 F.2d 1364 (6C); *Berwind-White* v. *Pitney*, 187 F.2d 665 (2C); (but

[2] In 1967, known to have its office within Texaco's offices in New York City.

see the majority and minority opinions by the Court below in this matter (1b-23b)), requiring that the shipowner, locate and mark the hull of its vessel endangering the shipping lanes as a non-delegable duty, nothwithstanding its notification to the government agency;

7. The suit will be proved by the depositions of witnesses from defendant Texaco's New York office and from interrogatories and admissions obtained from the defendant, to date denied by the Courts below even as to information on the question of convenience raised in the dismissal motion;

8. The United States vessel, "Leslie Lykes", was involved in the rescue operation; American crew members will be witnesses to testify to the fact that the hull could have been marked if a newer and faster vessel had been made available for that purpose. The identity of the officers of the vessel were part of the record before the Court below.

Cases requiring that the convenience of witnesses be shown by providing sufficient information for the motion Court to be assured of the fact, are: *United* v. *United States,* 192 F. Supp. 795; *Foster* v. *United States,* 188 F. Supp. 389; *Collins* v. *American,* 128 F. Supp. 228; *Cox* v. *Pennsylvania,* 72 F. Supp. 278. In the latter case, the Court, in denying the motion to dismiss on the issue of convenience of witnesses in the alternate forum, stated:

> "The court desires to call attention to the fact that the defendant in support of this motion makes a bald and general assertion that all of the material witnesses reside either in Pennsylvania or Illinois. This statement is not supported by any details. Thus, no names or addresses of the witnesses are given, or any state-

> ment as to what their testimony would be. While this omission, in itself, seems to constitute sufficient ground for denial of the motion, especially in the light of the fact that the plaintiff names certain witnesses who reside in New York . . ."

At this late date, neither the plaintiffs nor the Courts below have been given more than one witness by name, one John L. Watson, of defendant's London office, who received the offer from Smit-Tak requesting defendant's agreement to locate and mark the hull, and who passed the matter on to the New York office for decision.

The denial of permission to the plaintiff to depose and interrogate inhibited the information that could be submitted to the Court but, even so, there are two witnesses, John I. Mingay and H. R. Cristensen, from Texaco's New York office, to whom Smit-Tak's offer was forwarded for decision.

CONCLUSION

This matter involving a United States corporation with its principal place of business in the United States, predicated on United States statutory law and the general maritime law, for the negligence of its United States personnel, the connection of the United States being overwhelming, it is respectfully submitted that this Honorable Court review this matter by granting this Petition for Writ of Certiorari with an end to resolving the unanswered question raised in *Gulf Oil* v. *Gilbert*, 330 U.S. 501, and the conflict between Circuits, in determining whether an alternate forum is in reality available to all of the plaintiffs, both substantively and procedurally; whether the connection of the United States called for the Court below to

retain the jurisdiction properly acquired against the defendants; whether the principles of the *forum non conveniens* doctrine compelled the removal of this suit to England.

Dated: December 17, 1975.

Respectfully submitted,

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